A

TETUAN SULAIMAN & TAYE v. WONG POH KUN & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
HADHARIAH SYED ISMAIL JCA
B GUNALAN MUNIANDY JCA
[CIVIL APPEAL NOS: W-02(NCC)(W)-980-08-2020
& W-02(NCC)(W)-982-08-2020]
7 FEBRUARY 2023

C

Abstract – *The fraudulent intent of the directors of a company to defraud the creditors of the company in the process of winding up could be established where the directors, despite receiving monies which was more than enough to satisfy the creditors, prior to being wound up, allowed the company to fall into liquidation, without any explanation as to the dissipation of the monies. Hence, the directors were knowingly parties to the dissipation of the monies and thus knowingly a party to the fraud.*

D

E

COMPANY LAW: *Directors – Action against – Fraudulent trading – Elements to be proved – Carrying out business with intent to defraud creditors – Knowingly party to carrying on company's business in manner with intent to defraud creditors – Whether monies received by company prior to winding up sufficient to satisfy creditor – Whether dissipation of monies received explained – Whether intent to defraud company's creditors proved – Whether directors knowingly parties to carrying out dissipation of monies – Whether directors personally liable – Whether unsecured creditor retained right to recover debt from directors personally – Companies Act 2016, s. 540*

F

The respondents ('defendants'), WPK and WPL, former directors of Bistari Land Sdn Bhd ('BL') and mandatory signatories to the bank accounts of BL, engaged the plaintiff to render legal services in respect of various litigations for which the plaintiff issued a bill for the amount of RM5,907,500. As no payment was forthcoming, the plaintiff initiated a civil suit against BL and subsequently, entered judgment in default of appearance ('JID') against BL. BL filed a petition against the plaintiff to tax the bill and, at about the same time, applied to set aside the JID. The plaintiff and BL agreed for the bill to be taxed and by consent, the JID was set aside and the suit was withdrawn. In the taxation proceedings of the bill, the plaintiff, having been made aware that BL had entered into a sale and purchase transaction of its only asset, lands in Johor, applied for a mandatory injunction against BL to earmark/hold the sum of RM6,000,000 until the disposal of the taxation. However, before the petition was heard on its merits, BL was wound up and did not proceed with its application to tax the plaintiff's bill, resulting in the taxation

G

H

I

being struck out. The plaintiff subsequently filed its proof of debt ('POD') against BL, which has been received and admitted by the Insolvency Department. BL had not informed the court or the plaintiff or in the petition that the Government of Malaysia had obtained a summary judgment against BL for the sum of RM4,042,272.28 and served BL with a statutory demand for the sum of RM5,651,663.48 under the then s. 218 of the Companies Act 1965 ('CA 1965') pursuant to the summary judgment. The plaintiff was also not told that a winding-up petition had been filed against the company by the Government. Hence, the plaintiff's action against the defendants alleging that: (i) BL had sold the lands under the SPA for the sum of RM429,868,897.92 on 1 October 2013; (ii) although the proceeds of sale under the SPA of the lands had been paid, the defendants had failed to procure BL to pay the bill to the plaintiff; (iii) instead, the defendants filed the petition and did not disclose to the plaintiff and/or the court of the summary judgment, the statutory demand and/or that the winding-up petition had been filed against BL; (iv) the defendants had dissipated the proceeds of sale under the SPA, in particular, the plaintiff alleged that a sum of RM4,999,991 that was transferred into BL's account by the conveyancing stakeholder, was transferred out to the first respondent's personal account. After receiving the sum of approximately RM70 million, being the balance of the proceeds of sale under the SPA for the lands, the defendants had failed to utilise the same to pay the plaintiff and the Government and instead, had acted to deprive them of the debts and had dissipated the proceeds to themselves; and (v) the defendants had knowingly and intentionally carried on the business of BL to defraud the plaintiff while continuing with the proceedings under the petition and were liable to the plaintiff under s. 304(1) of the CA 1965. The defendants denied that they were in any way personally liable to the plaintiff for the bill which was rendered to BL and owed by BL to the plaintiff. The High Court ordered that both the defendants jointly and severally to pay the sum of RM5,907,500 and the sum owed to the Government to the liquidator of BL as contribution to the assets of the company. Hence, these two appeals: (i) Appeal 980 on the question as to whether the Judicial Commissioner ('JC') had erred in applying s. 304(1) of the CA 1965 in ordering that the monies were to be paid to the liquidator of BL as contribution to the assets of the company; and (ii) Appeal 982 by the defendants against the whole decision of the JC.

Held (allowing Appeal 980 and allowing Appeal 982 in part)
Per Gunalan Muniandy JCA delivering the judgment of the court:

(1) In actions against directors for fraudulent trading, the elements that must be proved are: (i) the business of the company has been carried out with intent to defraud creditors, or for any fraudulent purpose; and (ii) the defendants were knowingly parties to the company's carrying on of the business in that manner with intent to defraud creditors or for any fraudulent purpose. Intention by the defendants to defraud the creditors

of the company can be inferred from the fact that the company did not have a profit-generating business at the material time but placed unusually large orders without explaining how they were going to honour the company's obligations. A similar inference may be made when the defendants dissipate the company's assets when the company was not facing or facing any dire financial hardship. (paras 25 & 28)

(2) BL had received the sum of RM71,310,616.46 prior to being wound up, which was more than enough to satisfy any creditor. Despite receiving such amount, both WPK and WPL allowed BL to fall into liquidation, with no explanation as to where the proceeds had gone to. This was clear evidence to support WPL's alleged intent to defraud BL's creditors. WPL's pleaded defence that he was merely following his co-director's instruction was untenable considering, amongst others, that he was a mandatory co-signatory of BL. WPL was thus knowingly a party to the carrying out of the dissipation of the monies, and that to be knowingly a party to the fraud, the person does not have to know every detail of the fraud or how it is to be perpetrated. Merely turning a 'blind eye' to the fraud being perpetrated would suffice to implicate him and hold him liable to the company's creditors. (paras 39 & 40)

(3) The plaintiff was entitled to draw an adverse inference from WPL's inability to provide any explanation as a mandatory cheque signatory of BL on how the money received was dealt with. Further, WPL's refusal and/or inability to provide any explanation was a conscious withholding or suppression of evidence as he was in a position to provide such information, being the mandatory cheque signatory of the account; and that the monies were dissipated when WPL was still in control of BL. There was no reason and/or requirement for the plaintiff to call the liquidator to give evidence, as the said dissipation of the monies did not occur during the liquidator's management of BL. (para 41)

(4) BL had the opportunity and had indeed filed a petition to tax the plaintiff's bill. BL then, nevertheless, had ceded to challenge the said bill when it chose not to proceed with the said taxation proceedings. Thereafter, the plaintiff had proceeded to file its POD, which was duly received and admitted. The JC's finding of fact on the core issue of intention to defraud creditors of the company by WPL was supported by the evidence and facts adverted to in the JC's reasoning. Thus, the finding was clearly not shown to be incorrect, much less, plainly wrong to warrant any interference or variation. (paras 43 & 44)

(5) An unsecured creditor, such as the plaintiff, is entitled to obtain an order or judgment against directors personally pursuant to s. 304 of the CA 1965. The circumstance of the instant case called for personal liability against WPL as the director. As the plaintiff's pleaded case was purely concerned with the plaintiff's own claims, it was not an action whereby

the plaintiff was seeking to make WPK and WPL to be liable for any and/or all creditors' claims, including that of the Government, against BL. Hence, it was misconceived for the JC to secure the payment for the Government, a non-party to the action, in disregard of the facts and principles in respect of the said cause of action under s. 304(1) of the CA 1965 or s. 540 of the Companies Act 2016. (paras 54, 56 & 57)

(6) The fact that both s. 304 of the 1965 Act and s. 540 of the 2016 Act do not limit the right of any creditor to initiate action against the persons responsible for the fraudulent trading, it therefore must not have been Parliament's intention to provide such a limitation. A creditor who remains an unsecured creditor would, nevertheless, retain the right to recover the debt directly from the directors personally if they are shown to have acted wrongfully, as in the instant case, where there was ample evidence of WPL's wrongful act in dissipating the company's assets fraudulently to deny the appellant from recovering their debt. Hence, regarding Appeal 980, it was concluded that the JC had erred in principle when he gave the decision that the monies were to be paid to the liquidator as contribution to the company's assets. (para 60)

Case(s) referred to:

Chin Chee Keong v. Toling Corporation (M) Sdn Bhd [2016] 6 CLJ 666 CA ***(refd)***
Dato' Prem Krishna Sahgal v. Muniandy Nadasan & Ors [2017] 10 CLJ 385 FC ***(refd)***
Huatah Sdn Bhd v. Yap Chee Kian & Ors [2020] 2 CLJ 560 HC ***(refd)***
JCT Limited v. Muniandy Nadasan & Ors And Another Appeal [2016] 3 CLJ 692 CA ***(refd)***
Kuthubul Zaman Bukhari & Anor v. Tsai Su Chu & Ors [2013] 9 CLJ 524 HC ***(refd)***
LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors [2010] 4 CLJ 849 HC ***(refd)***
Re Cyona Distributors Ltd [1967] 2 MLR 369
Re Esal (Commodities) Ltd, London And Overseas (Sugar) Co Ltd And Another v. Punjab National Bank [1997] BCLC 705 ***(refd)***
Re William C Leith Bros, Ltd (No 2) [1932] All ER Rep 897 ***(refd)***
Tradewinds Properties Sdn Bhd v. Zulhkiple A Bakar & Ors [2019] 2 CLJ 261 CA ***(refd)***

Legislation referred to:

Companies Act 1965 (repealed), ss. 218, 304(1)
Companies Act 2016, ss. 528, 540(1)

Companies Act 1948 [UK], s. 332(1)
Insolvency Act 1986 [UK], s. 213

For the appellant - Lee Tat Yew & Premman Gopal; M/s Omar Ismail Hazman & Co
For the 1st respondent - Hafizah Johor Ariff Johor, Malaysian Department of Insolvency (MDI)
For the 2nd respondent - Ng Li Kien; M/s Ng, Gan & Partners

[Editor's note: For the High Court judgment, please see Tetuan Sulaiman & Taye v. Wong Poh Kun & Anor [2020] 10 CLJ 121 (overruled in part).]

Reported by S Barathi

A

JUDGMENT

Gunalan Muniandy JCA:

Introduction

[1] These are two appeals which were heard together against the decision
B of the learned Judicial Commissioner ('LJC') of the Kuala Lumpur High Court ('KLHC') made after a full trial of the suit before the LJC. The first appeal is against the order holding the defendants jointly and severally liable to pay the sum of RM5,907,500 and the sum due to the Government of Malaysia under the judgment dated 5 May 2010 to the liquidator of the
C company as contribution to the assets of the company.

Background Facts

[2] The defendants are brothers and were former directors of a company known as Bistari Land Sdn Bhd ('BL'). Both the defendants were mandatory
D signatories to the bank accounts of BL.

[3] Sometime in 2010, the plaintiff was engaged by BL to render legal services in respect of various litigations involving certain pieces of land belonging to BL.

E **[4]** For the legal services rendered, sometime on 2 July 2014, the plaintiff issued a bill for its services to the BL for an amount of RM5,907,500.

[5] As no payment was received from BL, the plaintiff initiated a civil suit against BL under Kuala Lumpur High Court Suit No: 22NCC-288- 08-2014 in August 2014 to recover the sum due thereunder ('Suit 288').

F **[6]** On 12 September 2014, the plaintiff entered judgment in default of appearance against BL in Suit 288 ('judgment in default').

[7] In December 2014, BL filed a petition against the plaintiff seeking to tax the bill. At about the same time, BL land applied to set aside the judgment in default.

G

[8] Subsequently, the plaintiff and BL agreed for the bill to be taxed and by consent, the judgment in default was set aside and Suit 288 was withdrawn on 7 July 2015.

[9] In the said taxation proceedings of the bill, the plaintiff had on or
H about August 2015 then applied for a mandatory injunction against BL Land to earmark/hold the sum of RM6,000,000 until the disposal of the taxation. The plaintiff made such an application as they were aware that BL had entered into a sale and purchase transaction of its only asset (lands in Johor) with Mah Seng Group, and will come into the final payment of the said
I transaction sometime on or before 30 September 2015. The second defendant, as director of BL, then affirmed an affidavit to state that BL Land

would not dissipate its assets (the proceeds of sale) to avoid paying the plaintiff and will satisfy all its debts, and had also stated that BL was solvent at all material times.

[10] However, before the petition was heard on its merits, BL's solicitors wrote to the court to inform that BL had been wound up on 29 January 2016 by the Government of Malaysia.

[11] With the winding up of BL, BL then did not proceed with its application to tax the plaintiff's bill, with the then application for taxation being struck out. The plaintiff subsequently filed its proof of debt against BL, which has been received and admitted by the Insolvency Department.

[12] BL had not informed the court or the plaintiff in Suit 288 or in the petition that the Government of Malaysia had obtained a summary judgment against BL on 5 May 2010 for the sum of RM4,042,272.28 ('the summary judgment') in Suit No: S5-21-64-2008 ('Suit 21') and that the Government of Malaysia had served BL with a statutory demand dated 21 April 2015 for the sum of RM5,651,663.48 as at 20 April 2015 under the then s. 218 of the Companies Act 1965 pursuant to the summary judgment. The plaintiff was also not told that a winding-up petition had been filed against the company on 26 October 2015 by the Government of Malaysia.

[13] By reason of the aforesaid, the plaintiff filed an action against the defendants alleging that:

(i) BL had sold the lands under the SPA for the sum of RM429,868,897.92 on 1 October 2013;

(ii) although the proceeds of sale under the SPA of the lands had been paid, the defendants had failed to procure BL to pay the bill to the plaintiff;

(iii) instead, the defendants filed the petition and did not disclose to the plaintiff and or the court of the summary judgment, the statutory demand and or that the winding-up petition had been filed against BL;

(iv) the defendants had dissipated the proceeds of sale under the SPA. In particular, the plaintiff alleged that a sum of RM4,999,991 that was transferred into BL's account on 18 June 2014 by the conveyancing stakeholder, was transferred out to the first respondent's personal account the following day on 19 June 2014. After receiving the sum of approximately RM70 million being the balance of the proceeds of sale under the SPA for the lands, the defendants had failed to utilise the same to pay the plaintiff and the Government of Malaysia and instead had acted to deprive them of the debts and had dissipated the proceeds to themselves; and

A (v) by reasons of the aforesaid, the plaintiff claimed that the defendants had knowingly and intentionally carried on the business of BL to defraud the plaintiff while continuing with the proceedings under the petition and are liable to the plaintiff under s. 304(1) of the CA 1965.

B **[14]** The defendants denied that they are in any way personally liable to the plaintiff for the bill which was rendered to BL and owed by BL to the plaintiff.

[15] The defendants denied that the transfer of RM4,922,008 to the first defendant's personal account on 19 June 2014 was to defraud the plaintiff as
C BL was only issued with the bill sometime on 2 July 2014. It is illogical that the defendants had transferred the monies to avoid the payment of the bill when the bill had not even been issued at the time of the transfer.

[16] The first defendant was adjudged a bankrupt on 15 October 2019. Leave to proceed with this action against the first defendant was obtained by
D the plaintiff from the bankruptcy court on 3 February 2020. He was not represented at the trial.

[17] The LJC ordered that both the defendants jointly and severally to pay the sum of RM5,907,500 and the sum owed to the Government of Malaysia to the liquidator of BL as contribution to the assets of the company.

E **Our Decision**

[18] We would, first and foremost, note that the judgment of the LJC (as he then was) dealt with s. 304 of the Companies Act 1965 ('CA 1965') which is now s. 540 of the Companies Act 2016 ('CA 2016'). As explained
F by the LJC, in particular, he deliberated upon the core issue as to whether directors of a company who are mandatory signatories to the company's bank accounts but are unable to provide any satisfactory explanation as to how monies received from the disposal of the company's sole asset were expended or dealt with, thus, causing the company to become unable to pay its debts
G to its creditors causing it to be subsequently wound up, can be said to have carried on the business of the company with the intent to defraud its creditors or for fraudulent purpose.

[19] A consequential issue that also called for the LJC's determination was whether the delinquent directors who are ordered to assume personal
H liability of the debts of the company under s. 304(1) of the CA 1965 should make the payment directly to the applicant under the section or to pay the sums into the assets of the company to be distributed *pari passu* to all general creditors in a case where the company has been wound up.

[20] We must also at the outset have in mind the essence of the plaintiff/
I appellant's case against the defendants ('D1 and D2') in the court below which was for both of them to be made personally liable for carrying on the business of the company with the intention to defraud the creditors of the

company or creditors of any other person or for any fraudulent purpose (as the directors in charge and/or managing the affairs finances and management of Bistari Land at that material time that it was wound up), based upon s. 540 of the CA 2016.

[21] The determination of Appeal 980 centred around the narrow question as to whether the LJC had erred in applying s. 304(1) of the CA 1965 when he ordered that the monies were to be paid to the liquidator of BL as contribution to the assets of the company.

[22] As regards Appeal 982, it is an appeal by the defendants ('WPK' and 'WPL') against the whole decision of the LJC.

[23] Based on the LJC's grounds of judgment ('GOJ') the appellant in Appeal 980 ('M/S Sulaiman & Taye') highlighted to us that the LJC had found both WPK and WPL liable based on the fact that WPL had both confirmed and admitted the fact that Bistari Land ('BL') had received RM71,310,616.46, which was also admittedly more than sufficient to settle all debts due to BL's creditors at that time, but have nevertheless allowed BL to fall into liquidation, with nary an explanation as to what happened to the sums received by BL. What was more damning, it was emphasised, was WPL's feigned ignorance as to what happened to the monies received, when WPL was a mandatory co-signatory of BL's accounts.

[24] For convenience, we reproduce s. 304(1) of the CA 1965 (of which s. 540(1) of the CA 2016 is a *verbatim* adoption of s. 304(1)) which states:

> If in course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court directs.

[25] We are in agreement with the High Court in *Huatah Sdn Bhd v. Yap Chee Kian & Ors* [2020] 2 CLJ 560 that in actions against directors for fraudulent trading, the elements that must be proved are:

> (i) the business of the company has been carried out with intent to defraud creditors, or for any fraudulent purpose; and
>
> (ii) the defendants were knowingly parties to the company's carrying on of the business in that manner with intent to defraud creditors or for any fraudulent purpose.

[26] As to whether there was intent to defraud or to carry out any fraudulent purpose is a question of fact to be inferred from the surrounding circumstances and the subsequent conduct of the defendants, especially the concealment of material facts (see *LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors* [2010] 4 CLJ 849).

[27] In order to prove intention to defraud, there is no necessity for evidence of a scheme to defraud the company's creditors as a single act of carrying on the company's business to defraud its creditors would suffice to trigger fraudulent trading (see *JCT Limited v. Muniandy Nadasan & Ors And Another Appeal* [2016] 3 CLJ 692).

[28] Intention by the defendants to defraud the creditors of the company can be inferred from the fact that the company did not have a profit-generating business at the material time but yet placed unusually large orders without explaining how they were going to honour the company's obligations (see *Chin Chee Keong v. Toling Corporation (M) Sdn Bhd* [2016] 6 CLJ 666). A similar inference may be made when the defendants dissipate the company's assets when the company was not facing or facing any dire financial hardship (see *Kuthubul Zaman Bukhari & Anor v. Tsai Su Chu & Ors* [2013] 9 CLJ 524).

[29] A case in point that both parties referred to in support of their respective contentions was that in the Court of Appeal decision of *Tradewinds Properties Sdn Bhd v. Zulhkiple A Bakar & Ors* [2019] 2 CLJ 261, where it was held that there was an intention to defraud when the first defendant (director of the second and third defendants) passed resolutions to reassign the second defendant's future earnings to the third defendant, resulting in the second defendant becoming a dormant company with no assets and therefore unable to pay its judgment debts to the plaintiff.

[30] The appellant in Appeal 980 submitted that the LJC, consistent with the above decision had made a correct finding based on the present factual scenario, that the case against WPL pursuant to s. 304(1) of the CA 1965 has been made out and accordingly, WPL was jointly and severally made liable with just cause and reason.

[31] R2 in Appeal 980 ('WPL') on the contrary contended that *Tradewinds* (*supra*) could be distinguished from the present case as the COA decision in that case was premised on there being clear and strong evidence (coupled with admissions by the defendants) to show a clear intention of the defendants attempting to defraud the plaintiff by depriving it from receiving the sums as agreed in the CJ. The third defendant was clearly a fraud instrument incorporated only on 4 September 2009 by the first defendant after Suit 93 was commenced on 16 February 2009, and prior to the CJ (consent judgment).

[32] However, in the instant case, R2 submitted that the plaintiff did not have any clear and/or strong evidence to show a clear intention of the second defendant having attempted to defraud the plaintiff by depriving it from receiving the sums of RM5,907,500 from Bistari Land ('BL'). Here, the plaintiff was said to be only relying on the fact that a sum of RM4,922,008 was transferred from BL's account to the first defendant's account on 19 June 2014 as basis to accuse the second defendant of fraud. On the purported dissipation of money, the plaintiff was said to have only documents regarding the transfer of the above sum. R2's position was that the issue here is only whether the sum of RM4,922,008 was transferred to avoid payment of RM5,907,500 by BL to the plaintiff.

[33] We would at this point take note of the defendants' pleaded case which is, *inter alia*, as summarised by R2 as follows:

(i) Bistari Land ('BL') never owed plaintiff any legal fee of RM5,907,500. The bill itself was not valid as it was grossly excessive and subject to taxation;

(ii) there was no valid and/or good reason why the defendants as former directors should be personally liable for any BL's purported debt;

(iii) the plaintiff's claim was merely an abuse of court process and only commenced by the plaintiff against the defendants because BL had been wound up and the plaintiff could no longer claim the sum of RM5,907,500 from BL; and

(iv) any fraud and wrongdoing alleged by the plaintiff is denied and the plaintiff is put to strict proof.

[34] In support of R2 ('D2')'s contention that the plaintiff's claim against (D2) had no basis and ought not to have been allowed by the LJC. R2 highlighted to us these salient facts.

(i) the transfer from BL's account to R1 ('D1')'s account was done on 19 June 2014, *ie*, about a month before the bill of costs was even issued to BL as evidenced by the relevant Alliance Bank statement.

(ii) the plaintiff's bill was dated 2 July 2014.

[35] Therefore it was submitted that the plaintiff's allegation that the transfer was made to avoid the plaintiff's bill was *inter alia*, totally misconceived, untrue and/or devoid of any merits.

[36] In essence, what R2 impressed upon us is that as at the date of the transfer on 19 June 2014 there was no debt due and/or obligation on the part of BL to pay the plaintiff. Hence, as at that date, the plaintiff could not even be regarded as a creditor or prospective creditor within the meaning of s. 304 of the CA 1965. Besides, at the time the transfer was made on 19 June

A 2014, there was no proceedings commenced against BL by the plaintiff for the bill of RM5,907,500. As such, it followed that should not be held liable under s. 304 of the CA 1965.

[37] Primarily, the question that arose for our deliberation was whether the fraudulent intent by R2 to defraud the creditors of BL was carried out in the B process of winding up the company or in any proceeding against the company was the restrictive approach taken by R2 that s. 304 of the CA 1965 only applies if the transfer or the so called "dissipation" was made "in the course of proceedings" against BL for the sum of RM5,907,500 which was commenced by the plaintiff *vide* Suit 288 only sometime in August 2014.

C **[38]** When the suit was commenced, some two months had lapsed since the date of the transfer. R2, therefore, submitted that s. 304(1) of the CA should not have been invoked against R2 as a former director of BL for him to be held personally liable to the plaintiff for the dissipation of BL's assets causing it to be wound up.

D **[39]** As to R2's point that as the alleged fraudulent trading did not occur during the wound up proceedings, any intention to defraud has not been proved. We accept the appellant M/S Sulaiman & Taye ('ST's') proposition that reference must be made to the wording of s. 304(1) of the CA 1965 and s. 540(1) of the CA 2016, which does not stipulate that the acts of fraudulent E trading in question can only occur during the wound up proceedings of the company.

[40] In finding intent to defraud, among the factors that the LJC took into account was that BL had received the sum of RM71,310,616.46 prior to F being wound up which WPL ('R2') admitted, which was more than enough to satisfy any creditor. Despite such amounts being received, both WPK and WPL allowed BL to fall into liquidation, with no explanation as to where the proceeds had gone to. Our view is that this was a crucial fact to which the LJC, had rightly given due consideration as it was clear evidence to G support WPL's alleged intent to defraud BL's creditors. To our minds too WPL's pleaded defence that he was merely following his co-director (brother)'s instruction was untenable considering amongst others, that he was a mandatory co-signatory of BL. There was no error in the LJC's finding that, at the very least, WPL was knowingly a party to the carrying out of the dissipation of the monies, and that to be knowing by a party to the fraud, the H person does not have to know every detail of the fraud or how it is to be perpetrated. Merely turning a "blind eye" to the fraud being perpetrated would suffice to implicate him and hold him liable to the company's creditors.

I **[41]** We are also in agreement with the LJC's view that the plaintiff is entitled to draw an adverse inference from WPL's inability to provide any explanation as a mandatory cheque signatory of BL on how the money

received was dealt with. Further, WPL's refusal and or inability to provide any explanation is a conscious withholding or suppression of evidence as he was in a position to provide such information, being the mandatory cheque signatory of the account; and that the monies were dissipated when WPL was still in control of BL. Therefore, there is no reason and/or requirement for the plaintiff to call the liquidator to give evidence, as the said dissipation of the monies did not occur during the liquidator's management of BL.

[42] Premised on the above facts, the LJC was correct in finding that having established that the monies were dissipated during WPL's control and management of BL, the plaintiff had satisfied its burden of proof, and the onus shifted to WPL to show that the monies were not dissipated wrongly, to support his defence as such, it is rightly found that it was WPL who should have called the liquidator as a witness if he took the position that the liquidator was in possession of the material documents on the dissipation of the monies.

[43] Among the other important grounds raised in WPL's memo of appeal and submission is that BL did not owe a sum of RM5,907,500 to M/S Sulaiman & Taye. Related to this ground is WPL's defence that the said bill is grossly excessive and had not been proven to be reasonable and correct. On this point, the plaintiff's reply found favour with us that BL did have the opportunity and had indeed filed a petition to tax the plaintiff's bill. BL then, nevertheless, had ceded to challenge the said bill when it chose not to proceed with the said taxation proceedings. Thereafter, the plaintiff had proceeded to file its proof of debt ('POD'), which was duly received and admitted.

[44] Having regard, essentially, to the foregoing, we held that the LJC's finding of fact on the core issue of intention to defraud creditors of the company (BL) by the appellant WPL was supported by the evidence and facts adverted to in the LJC's reasoning. Thus, the finding was clearly not shown to be incorrect, much less, plainly wrong to warrant any interference or variation by us.

[45] We will now proceed to explain our decision in respect of Appeal 980 when, as pointed out by the respondents, based on the plaintiff's memo of appeal the main focus of the plaintiff's appeal is that the High Court had ordered the sum of RM5,907,500 to be paid to the liquidator of BL instead of the plaintiff directly. It was contended by the respondents that the LJC was right in principle to order that the debt allegedly due to the appellant was to be paid to the liquidator to prevent any "under preference" to the plaintiff which would infringe s. 528 of the CA 2016. Otherwise, it would purportedly render the rule of undue preference nugatory. For ease of reference, we reproduce s. 528 of the CA 2016 as follows:

A Undue preference

(1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which is unable to pay its debts, as the debts become due, from its own money in favour of any creditor or any person in trust for any creditor shall be
B deemed to have given such creditor a **preference over other creditors** in the event of the company being wound up on a winding up petition presented within six months from the date of making or doing the same and every such act **shall be deemed fraudulent and void**.

(emphasis added)

C **[46]** On the above premise, R2 took the position that the plaintiff ought not to be given any preference above other lawful creditors and as such, payment was correctly ordered to be made to the liquidator instead of the plaintiff.

[47] We were not in agreement with R2's contention that the LJC had not erred in principle in ordering that the monies be paid out to the liquidator
D of BL as contribution to the assets of the company.

[48] The contrary position taken by the appellant was in accord with our view on the issue at hand.

[49] First and foremost, the appellant informed us that the LJC had
E requested for further submissions as to the issue whether or not the monies should be paid to the plaintiff herein or to the liquidator of BL before the judgment was pronounced. Secondly, it was pointed out to us that the positions in the United Kingdom ('UK') under s. 332(1) of the UK Companies Act and Malaysia pursuant to s. 304 of the CA 2016 were similar. Both provisions allowed for not only the liquidator, but also any
F creditor or contributory to seek redress against the person who were knowingly parties to the fraud to be made personally liable.

[50] As to the issue of whether or not such an order would have the effect of making any such applicant (the plaintiff in this case) a secured creditor
G with some preference to other creditors was then addressed by the UK *via* the Insolvency Act 1986. Section 213 of the UK Insolvency Act 1986.

[51] An equivalent provision is not found in Malaysia which stipulates that only the liquidator is entitled to make such an application. On the contrary, s. 304 (now of our CA expressly s. 540) allows the liquidator, any creditor
H or any contributory to take such action.

[52] Hence, in our opinion, it was erroneous for the LJC to have held that English decision on the interpretation of s. 332(1) of the UK Companies Act 1948 are still relevant and useful in our consideration of s. 304(1) of the CA 1965. It would be a correct view if CA 1965 was still the prevailing company
I law in our jurisdiction. As the governing company law presently in force in Malaysia is the CA 2016 which does not contain the restrictions as introduced by the UK Insolvency Act *vide* s. 213, the legislative intent of the Malaysian Parliament was not for the same restriction to apply in Malaysia.

[53] As rightly brought to our attention the English cases of *Re William C Leith Bros, Ltd (No 2)* [1932] All ER Rep 897, *Re Cyona Distributors Ltd* [1967] 2 MLR 369 and *Re Esal (Commodities) Ltd, London And Overseas (Sugar) Co Ltd And Another v. Punjab National Bank* [1997] BCLC 705, as relied on by the LJC, were cases decided based on the previous English position under s. 332 of the UK Companies Act 1948, which was then superseded by a change in the legislation by way of s. 213 of the UK Insolvency Act 1986. However, our Parliament had chosen not to introduce the restrictive provisions of the same type. Our apex court in *Dato' Prem Krishna Sahgal v. Muniandy Nadasan & Ors* [2017] 10 CLJ 385 had held that the director was to be personally liable and responsible to pay the employees (who were unsecured creditors) of the company, which had already been wound up. (See also *JCT Limited v. Muniandy Nadasan & Ors* [2016] 3 CLJ 692 Court of Appeal).

[54] As such, on the law as it stands, an unsecured creditor such as the present plaintiff is entitled to obtain an order or judgment against directors personally pursuant to s. 304 of the CA 1965.

[55] In seeking to distinguish the facts of the Court of Appeal case of *JCT Limited* (*supra*) where the director of the company to be personally liable to the respondents, who were unsecured of creditors, the LJC opined that:

> However, the facts in that case are quite different. The court did not order the delinquent directors to pay other debts of the company apart from the particular debts claimed by the employees. Also, the employees claims in that case would have enjoyed a priority over the general creditors under s. 292 of the CA 1965 and thus, would not have been shared *pari passu* with the general unsecured creditors.

[56] We agree with the appellant's contention that the LJC fell into error as to the classification of creditors as expressed in the *JCT* judgment. In that case, the judgment classified the creditors concerned as only unsecured creditors without any consideration regarding the rank of creditors or *pari passu* as mistakenly construed by the LJC. The right of a creditor to seek redress against the directors personally arose when the situation called for it depending on the circumstance of the particulars. We are inclined to hold that the circumstance of the instant case indeed called for personal liability against R2 as the director contrary to the finding of the LJC.

[57] We would hasten to add that as the plaintiff's pleaded case before this Honorable Court is also purely concerned with the plaintiff's own claims it is not an action whereby the plaintiff herein is seeking to make WPK and WPL to be liable for any and/or all creditors' claims, including that of the Government of Malaysia against BL. Considering the plaintiff's pleaded cause of action, it was misconceived for the LJC to secure the payment for the Government of Malaysia, a non-party to the action in disregard of the facts and principles in respect of the said cause of action under s. 304(1) of the CA 1965 or s. 540 of the CA 2016.

[58] Notwithstanding that the LJC stated that it was unfortunate that the liquidator was not made a party to the suit, we consider this to be an irrelevant and a non-issue in the resolution of the present suit, particularly in regard to the party entitled to be paid damages. More importantly, the LJC should have appreciated the following facts highlighted by the plaintiff:

(i) that the liquidator has been informed of the suit, and it was incumbent on the liquidator to have sought to intervene, if was deemed necessary; and

(ii) neither s. 304(1) of the CA 1965 nor s. 540(1) of the CA 2016 stipulates that the liquidator must be made a party in situations where the company has been wound up.

[59] Rightly, having taken cognisance of the fact that the liquidator is not a party to the suit before the court, the LJC should have been even more wary in pronouncing its judgment for the monies to be paid to the liquidator.

[60] Lastly, we accept the plaintiff/appellant's proposition to be correct in law that the fact that both s. 304 of the CA 1965 Act and s. 540 of the CA 2016 does not limit the right of any creditor to initiate action against the persons responsible for the fraudulent trading, it therefore must not have been Parliament's intention to provide such a limitation. As decided by both the Court of Appeal (*JCT*'s case) and affirmed by the Federal Court (*Dato' Prem*'s case), a creditor who remains an unsecured creditor would, nevertheless, retain the right to recover the debt directly from the directors personally if they are shown to have acted wrongfully, as in the instant case where there was ample evidence of R2 wrongful act in dissipating the company's assets fraudulently to deny the appellant from recovering their debt. We conclude on Appeal 980 that the LJC had erred in principle when he gave decision that the monies are to be paid to the liquidator as contribution to the company's assets.

Conclusion

[61] We pronounced the following decision, with broad grounds, in respect of both appeals:

> Appeal 982
>
> We find that there is more than ample evidence to support the High Court's findings that the directors of the company had carried on business to defraud creditors.
>
> In particular in this case, the company was in a position to pay the legal fees of the legal firm but the directors simply could not explain where the sum of RM70 million had been paid out to. The court is entitled to make the necessary inference and finding, especially under s. 106 of the Evidence Act, to arrive at the conclusion that the directors are personally liable for the amount claimed as the fact in issue was especially within

their exclusive knowledge. However, as the Inland Revenue Department ('IRD') is not a party to the suit, we are of the considered opinion that the High Court had erred into venturing into the Inland Revenue's debt when IRD was not a plaintiff or a party before the court.

We therefore would set aside that part of the High Court's decision relating to the Inland Revenue Department's debt.

In other words, we allow the appeal of the appellant (Director) in part and make each party bear its own costs here.

Next, as regards Appeal 980.

We are of the considered view that in the circumstances of this case and based on the findings of fact by the High Court, the proper order should be an order for the payment of the legal fees of RM5,907,500.00 and interest as claimed direct to the appellant by the Respondents jointly and severally. We do not think that such a payment would offend the priority of payment principle as the action was brought against the delinquent directors personally and not against the wound-up company. It was also not brought by the Liquidator.

We would, therefore, allow the appeal and set aside that part of the order of the High Court appealed against with costs of RM20,000 to the appellant subject to allocator.